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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

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11 JEREMY DE JONG,

12 Plaintiff,

13 v.

14 GREAT WOLF RESORTS, INC., d.b.a.
GREAT WOLF LODGE,

15 Defendant.

CASE NO. 19-5354 RJB

ORDER ON DEFENDANT'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT

16 This matter comes before the Court on the Defendant Great Wolf Resorts, Inc.'s ("Great
17 Wolf") Motion to Dismiss First Amended Complaint. Dkt. 25. The Court has considered the
18 pleadings filed in support of and in opposition to the motion and the file herein.

19 In this diversity case, the Plaintiff claims that Great Wolf created, perpetuated, and failed
20 to address, a hostile work environment, based on his sex/gender, and retaliated against him by
21 terminating his employment all in violation of the Washington Law Against Discrimination,
22 RCW § 49.60, *et seq.*, ("WLAD"). Dkt. 22. The only claim in the original Complaint,
23 termination in violation of public policy, was dismissed on July 1, 2019, without prejudice, in
24 part, for failure to allege facts to show that the public-policy linked conduct caused his dismissal.

1 Dkt. 21. The Plaintiff, with leave of court, filed the Amended Complaint. Dkt. 22. Great Wolf
2 (who asserts that the Plaintiff improperly names it as the Defendant, and not Plaintiff's real
3 employer, Great Lakes Services, LLC), now moves to dismiss the case, arguing that the Plaintiff
4 fails to allege that the harassment occurred because of his sex/gender or that there was a causal
5 connection between the Plaintiff's discharge and his purported protected activity. Dkt. 23. For
6 the reasons provided below, the motion (Dkt. 23) should be denied.

7 **I. FACTS AND PROCEDURAL HISTORY**

8 **A. FACTS**

9 The following facts are from the Plaintiff's First Amended Complaint and are presumed
10 true for the purposes of this motion.

11 The Plaintiff was hired to work at Great Wolf, a hotel and inside water park, on October
12 25, 2017, as the Director of Engineering. Dkt. 22, at 9. Prior to the events that give rise to this
13 action, he alleges that he met or exceeded performance goals and received only positive
14 performance reviews. *Id.*, at 8-9.

15 The First Amended Complaint asserts that on January 23, 2018, the Plaintiff reported to
16 Great Wolf management that a co-worker, Marilyn Milani, the Director of Rooms, "wrote
17 various graffiti on an interior wall and then destroyed it." Dkt. 22, at 10. He did so by text
18 message to Human Resources Manager Tawni Houk and included pictures, which appear in the
19 First Amended Complaint. *Id.*, at 10-11. The picture is of a wall with writing on it and portions
20 of the drywall and insulation torn away. *Id.*, at 11. The next day, Milani emailed the Plaintiff,
21 "stating that she had begun destructively tearing the wall down in housekeeping via her pack
22 ritual but did not plan on encountering insulation and metal." *Id.* The First Amended Complaint
23 maintains that she then asked the Plaintiff to "schedule someone to remove the wall." *Id.* The
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1 Plaintiff asserts that he reported Milani's conduct a second time, this time to the General
2 Manager, Nadine Miracle. *Id.*

3 The First Amended Complaint alleges that in retaliation for the Plaintiff's reports, on
4 January 26, 2018, Milani reported to human resources that the Plaintiff "objectified women." Dkt.
5 22, at 12. He asserts that when he pointed out that the timing of her complaint was suspicious,
6 Miracle and Houk stated that due to the nature of Milani's claims, they would not treat the report as
7 retaliatory. *Id.*

8 The First Amended Complaint alleges that when he was not disciplined as a result of
9 Milani's claim, Milani began a rumor that he was having an affair with another married co-worker,
10 Herbert. Dkt. 22, at 11. He maintains that Miracle went to Houk and inquired as to whether they
11 should contact the police to investigate because "in Pennsylvania where [Miracle] was from,
12 adultery is illegal." *Id.* at 12. The Plaintiff asserts that he did not have the affair. *Id.* Milani is
13 alleged to have then "ran an unauthorized audit through the workplace computer system on Plaintiff
14 [and Herbert]" and gave his personal contact information to Herbert's husband. *Id.* The Plaintiff
15 asserts that Milani continued to defame and harass him on social media. *Id.*, at 13. He asserts that
16 other of Milani's friends at work also harassed him by making unwelcome sex-based comments.
17 *Id.*, at 13. Plaintiff states that Milani was increasingly hostile to him, would not communicate with
18 him, and made it very difficult to do his job due to the interrelated nature of their duties. *Id.*, at 14.
19 The Plaintiff reported Milani's behavior, but he asserts that General Manager Miracle indicated that
20 she disagreed that any such behavior was occurring. *Id.* In March of 2018, Milani was discharged.
21 Dkt. 22, at 15.

22 The First Amended Complaint alleges that the Plaintiff's performance evaluation for April
23 2018 indicated that he "consistently meets" goals and work expectations and that his overall
24 performance was "strong contributor." Dkt. 22, at 15-16.

In early June 2018, Plaintiff and a few other employees headed to Seattle to participate in a
work-related program. Dkt. 22, at 15. The Plaintiff alleges that he left with Ms. Herbert, but that

1 after they left, they received a call from General Manager Miracle that they were to wait on the side
2 of the road for her. *Id.* at 16. Plaintiff asserts that Miracle forced him to ride with her. *Id.* When
3 asked why, the Plaintiff maintains that Miracle told him, “boys and girls should not ride alone in
4 cars together.” *Id.*, at 17.

5 Both Ms. Herbert and the Plaintiff filed complaints with human resources regarding this
6 episode. Dkt. 1-1, at 17. Plaintiff maintains that their “complaints detailed how their boss, GM
7 Miracle, believed the sexual harassment perpetrated by Ms. Milani.” *Id.* On June 28, 2018, the
8 Plaintiff asserts that he asked Human Resources Manager Houk about the status of his complaint.
9 *Id.* He maintains that Houk told him that Bryan Robinson of Corporate Human Resources told
10 her to “put a stop to any further complaints” and that if they wanted to complain “they know
11 where the door is.” *Id.* He asserts that he was not promoted in July 2018, despite having been
12 given the impression that he was the top candidate. *Id.*, at 18.

13 The First Amended Complaint alleges that on July 24, 2018, a meeting was held between
14 the Plaintiff, General Manager Miracle, and Assistant General Manager, Nick Licastro. Dkt. 22,
15 at 18. The Plaintiff maintains that he politely disagreed with them on an issue. *Id.* He asserts
16 that they went to human resources and said that, “he would regret being mean” to them. *Id.*

17 The First Amended Complaint asserts that the Plaintiff met with Miracle and Licastro on
18 August 14, 2018. Dkt. 22, at 19. They are alleged to have then told him that other employees
19 are talking about his affair with Ms. Herbert and that they believed that he was having an affair
20 with Ms. Herbert. *Id.* He maintains that he was told that while it was not against company
21 policy, it reflected poorly on him and Ms. Herbert because they were both married. *Id.* The
22 Plaintiff repeatedly denied the affair. *Id.* The Plaintiff asserts that he “reiterated that the group
23 of employees harassing him are very close friends outside of work with Ms. Milani, the woman
24 who was fired after Plaintiff [] reported the vandalism.” *Id.* The Plaintiff alleges that they told

1 him they had reports of the Plaintiff and Ms. Herbert talking in the hall, and that he should avoid
2 her in the future. *Id.*, at 20. The Plaintiff felt it would impede his ability to do his job if he were
3 to avoid Ms. Herbert in the future. *Id.* He asserts that he felt singled out and harassed because
4 other male and female co-workers rode in cars together and had closed-door meetings. *Id.*

5 The First Amended Complaint asserts that on August 15, 2018, he filed a second
6 complaint with human resources concerning the previous day's meeting, claiming that he was
7 being subjected to a hostile work environment, sexual harassment, and the meeting the day
8 before exhibited that the "belief of the rumors by his co-workers and especially his bosses had
9 become so pervasive as to alter and impede his ability to perform the duties of his position."
10 Dkt. 22, at 20. He alleges that a few days later, Ms. Herbert was told by a co-worker that
11 General Manager Miracle and Assistant General Manager Licastro told the co-worker to report
12 to them any time she saw Ms. Herbert and the Plaintiff talking. *Id.*, at 21.

13 On August 23, 2018, the Plaintiff met with human resources. Dkt. 22, at 20. He asserts
14 that they told him that the conversation with Miracle and Licastro was intended to be
15 informative, not punitive. *Id.* The Plaintiff maintains that they asked if he was happy at Great
16 Wolf and he asserts that he told them he was not and was looking for other employment. *Id.*
17 The Plaintiff told them he hired a lawyer. *Id.*, at 22. He alleges that they got defensive. *Id.* On
18 August 29, 2018, Plaintiff's lawyer sent Great Wolf a letter of representation and for evidence
19 preservation. *Id.*, at 23.

20 On September 19, 2018, the Plaintiff met with Assistant General Manager Licastro and
21 staff from human resources. Dkt. 22, at 23. The general manager was not present. *Id.* He was
22 given a performance improvement plan ("PIP") for events he alleges were either falsified or were
23 knowingly misconstrued because they were not raised by management at the time they occurred.

1 *Id.* He asserts that he was also given a confidential severance agreement and release. *Id.*
2 Plaintiff alleges he was told to take a day off and decide whether to agree to the PIP, which
3 would last 45-days, or take the severance. *Id.*

4 The Plaintiff sent an email the next day to human resources, attached his employment
5 contract, and stated that he wanted to discuss his PIP with General Manager Miracle, his
6 supervisor, as provided in the employment contract. Dkt. 22, at 24. Human Resources staff
7 responded, let him know that General Manager Miracle approved the PIP, and that it would be in
8 place even before he signed it. *Id.* A meeting was set for September 26, 2018. *Id.* The
9 Plaintiff's lawyer let Great Wolf know that he would not accept the severance and wanted to
10 remain employed. *Id.*

11 According to the First Amended Complaint, on September 26, 2018, the Plaintiff
12 attended the meeting, provided a written point-by-point refutation of the PIP. Dkt. 22, at 25.
13 Great Wolf discharged the Plaintiff that day. *Id.* He later learned it was for "poor work
14 performance." Dkt. 22, at 9.

15 The First Amended Complaint alleges that:

16 Defendant Great Wolf upper management orchestrated a calculated witch hunt
17 against Plaintiff . . . based on preposterous lies, adding bogus reprimands to his
18 previously sparkly personnel file MONTHS after Defendant Great Wolf claims
19 the fabricated "poor work performance" occurred – all aimed at getting rid of
20 their previously celebrated rockstar employee, Plaintiff . . . who had the audacity
21 to report safety concerns he discovered on Defendant Great Wolf's property.
22 Safety concerns that put in danger the safety of Defendant Great Wolf employees,
23 vendors and guests (the majority of which are families with young children).

24 Dkt. 22, at 27. The Plaintiff makes two WLAD claims: (1) sexual harassment, in the form of a
hostile work environment, and (2) retaliation. Dkt. 22. He seeks damages, attorneys' fees and
costs. *Id.*

After the First Amended Complaint was filed, Great Wolf moved to dismiss the case, arguing that Plaintiff has failed to state a claim for hostile work environment or retaliation because he did not sufficiently plead that the alleged harassment occurred because of his sex or gender. Dkt. 23. It additionally moved to dismiss Plaintiff's retaliation claim asserting that the Plaintiff failed to allege sufficient facts from which to conclude that there was a causal connection between the Plaintiff's discharge and his protected activity. *Id.*

II. DISCUSSION

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.*, at 555. The complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.*, at 547.

Dismissals under Rule 12(b)(6) for failure to state a claim should ordinarily be without prejudice. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003). “Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect.” *Id.*

B. WASHINGTON SUBSTANTIVE LAW APPLIES

Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity jurisdiction, as here, apply state substantive law and federal procedural law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). In applying Washington law, the Court must apply the law as it believes the Washington Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). “[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.” *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir.2001) (quoting *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996) (internal quotation marks omitted)).

C. HOSTILE WORK ENVIRONMENT CLAIM

The WLAD prohibits employer discrimination based on “sex.” RCW 49.60.180(3). The statute provides that “sex means gender.” RCW 49.60.040 (25). To establish a prima facie hostile work environment claim case under the WLAD, a plaintiff must show that, because of their sex, they were subjected to unwelcome conduct “that was sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive working environment,” and was imputable to the employer. *Campbell v. Hawaii Dep’t. of Educ.*, 892 F.3d 1005, 1007 (9th Cir. 2018)(internal quotation marks and citations omitted); *Loeffelholz v. Univ. of Washington*, 175 Wash. 2d 264, 274 n.1 and 275 (2012)(noting that Washington courts have traditionally found federal case law persuasive and use the same prima facie case).

1 Great Wolf argues that the Plaintiff has failed to allege sufficient facts that the
2 harassment occurred “because of” Plaintiff’s sex. Dkt. 23.

3 In determining whether harassment is “because of sex,” “the question to be answered
4 here is: would the employee have been singled out and caused to suffer the harassment if the
5 employee had been of a different sex? This statutory criterion requires that the gender of the
6 plaintiff-employee be the motivating factor for the unlawful discrimination.” *Glasgow v.*
7 *Georgia-Pac. Corp.*, 103 Wn.2d 401, 406 (1985). “That the Legislature intended the word ‘sex’
8 to mean a classification rather than activity of a sexual nature generally is apparent from its
9 placement in a list of other classifications according to which human beings can be
10 characterized, e.g., age, race, color, creed, marital status, and national origin.” *Doe v. State,*
11 *Dep’t of Transp.*, 85 Wn. App. 143, 149 (1997).

12 Great Wolf’s motion to dismiss the Plaintiff’s claim for hostile work environment based
13 on sex/gender should be denied. The Plaintiff alleges that the first allegation leveled at him was
14 that he “objectified women,” and after that did not work, became rumors about him having an
15 affair with a married woman. A reasonable inference is that the rumors were circulated to
16 continue the notion that he was a womanizer. While the case is thin, the Plaintiff has alleged
17 sufficient facts to show that he would not have been treated the same way had he been a woman.

18 **D. RETALIATION CLAIM**

19 To make a claim for retaliation under the WLAD, plaintiffs must show (1) they engaged
20 in a protected activity, (2) an adverse employment action occurred and (3) a causal link between
21 the two. *Milligan v. Thompson*, 110 Wash.App. 628, 42 P.3d 418, 424 (2002); *Brooks v. City of*
22 *San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

1 Great Wolf's motion to dismiss Plaintiff's retaliation claim should be denied. There is no
2 dispute that an adverse employment action was taken – the Plaintiff's employment was
3 terminated.

4 Great Wolf moves to dismiss this claim by arguing that Plaintiff does not sufficiently
5 plead the first element - that he engaged in a protected activity because Plaintiff could not have
6 reasonably believed that he was being harassed because of his sex/gender when he made reports
7 to that effect. Dkt. 23.

8 Opposing sexual harassment is a protected activity under the WLAD. RCW 49.60.210.
9 To show that a plaintiff engaged a "statutorily protected activity" under the WLAD, a plaintiff
10 need only prove that their "complaints went to conduct that was at least arguably a violation of
11 the law, not that [their] opposition activity was to behavior that would actually violate the law
12 against discrimination." *Estevez v. Faculty Club of Univ. of Washington*, 129 Wn. App. 774, 798
13 (2005).

14 The Plaintiff has alleged sufficient facts that his complaints of sexual harassment went to
15 conduct that was at least arguably a violation of the WLAD. The Plaintiff complained that about
16 being accused of "objectifying" women and that nothing was done about rumors being spread
17 that he was engaged in an affair with a married woman. The Plaintiff complained about being
18 mistreated because of the rumors. He asserted that his supervisors continued to act on the
19 rumors and singled him out to ensure he was not alone with a person of the opposite sex and
20 counseled him to avoid Ms. Herbert. He alleges that his supervisors asked others to report on his
21 activities with Ms. Herbert. At this early stage in the litigation, his pleading is sufficient to show
22 the conduct about which he complained is arguably a violation of the WLAD.

1 Great Wolf also argues that the claim should be dismissed because he failed to plead the
2 third element of a retaliation claim - a causal connection between his complaints and the adverse
3 employment actions. Dkt. 23.

4 “An employee proves causation by showing that retaliation was a substantial factor
5 motivating the adverse employment decision.” *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 412
6 (2018). “Employees may rely on the following facts to show this: (1) the employee took a
7 protected action, (2) the employer had knowledge of the action, and (3) the employee was
8 subjected to an adverse employment action.” *Cornwell*, at 413.

9 As above, the Plaintiff has alleged sufficient facts to show, at least at this stage of the
10 litigation, that he took protected action. Moreover, Great Wolf had actual knowledge of his
11 reports. The Plaintiff alleges that his managers were aware he complained to the human
12 resources department multiple times that he was being sexually harassed. It is undisputed that he
13 was subjected to an adverse employment action (termination) in less than a month and a half
14 after his last formal complaint of sexual harassment. In the July 1, 2019 Order dismissing the
15 original Complaint’s claim for termination in violation of public policy, the undersigned found
16 that the almost nine-month gap between the Plaintiff’s report of Ms. Malini’s vandalism and the
17 termination of his employment was not close enough in time to find that that report was the
18 cause of his termination. The gap between his last report of sexual harassment is much smaller -
19 less than 90 days. “That an employer’s actions were caused by an employee’s engagement in
20 protected activities may be inferred from proximity in time between the protected action and the
21 allegedly retaliatory employment decision.” *Cornwell*, at 416 (*internal quotation marks and*
22 *citations omitted*). Great Wolf’s motion to dismiss the retaliation claim should be denied.

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- The Defendant’s Motion to Dismiss First Amended Complaint (Dkt. 23) **IS DENIED.**

Dated this 9th day of September, 2019.

ROBERT J. BRYAN
United States District Judge